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By. J. Bell for D. E. S.
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IN THE SUPREME COURT OF THE UNITED STATES.

J. C. LEAGUE, PLAINTIFF IN ERROR,

VS.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

C. K. BELL, Attorney General,
D. E. SIMMONS, Assistant Attorney General,
Counsel for Defendant in Error.

VON BOECKMANN, SCHUTZE & CO., PRINTERS, AUSTIN, TEXAS.

IN THE SUPREME COURT OF THE UNITED STATES.

J. C. LEAGUE, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF TEXAS.

Brief and Argument for Defendant in Error.

The statement of the case, as to the manner in which it was presented in the courts below and its present status, are sufficiently set forth by plaintiff in error in his brief now on file before this court. We will, for the convenience of the court, as well as ourselves, follow the order of plaintiff as therein given.

QUESTION OF JURISDICTION.

However, before presenting any argument upon the merit of the question raised, we desire to call this Honorable Court's attention to the question of jurisdiction. We believe that it is a long since settled doctrine in Federal jurisprudence, that no presumptions are indulged with respect to the jurisdiction of Federal courts, but that the question presented calling for the exercise of such jurisdiction must clearly appear from the petition presented or the record in the case. We understand and appreciate the doctrine that every court must perforce have the power to determine, upon doubtful matters, the question of its own jurisdiction. This question, when raised, has always received timely consideration at the hands of Federal courts whose powers are not coextensive with courts of equity and common law, but are limited by the Constitution and laws of Congress passed in pursuance thereof.

If any Federal question is involved in the case at bar, it arises by reason of a right claimed by plaintiff in error, to be protected by the Constitution of the United States, and of which right he is being deprived by the operation of a State statute. The right which it is claimed is violated is a right of property, protected by the last clause of Section 1, of Article 14, of the amendments to the Constitution of the United States, viz.: "*Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*" Plaintiff in error does not claim that any discrimination is made against him in favor of any other person or class of persons, but that the delinquent tax law of Texas (Ch. 103 of 25th Leg.), under which the present suit was brought, deprives him of his property "*without due process of law.*"

The law in question, as is the case with most State tax laws, is somewhat lengthy, but the particulars in which it is claimed that the law contravenes the above provision of the Federal Constitution may be briefly stated. It is urged that Section 13 of the act is retroactive. Section 13 is as follows:

"*Any delinquent tax payer whose lands have been returned delinquent or reported sold to the State for taxes due thereon, or any one having an interest therein, may redeem the same at any time before his lands are sold under the provisions of this act, by paying to the collector the taxes due thereon since January first, 1885, with interest at the rate of six per cent. per annum and all costs and the penalty of ten per cent., as provided for in Section 16 of this act; provided, such penalty has accrued under the provisions and since the passage and taking effect of this act.*"

The propositions presented by counsel may be summarized, as follows: 1st, That portion of the above section which imposes six per cent. interest, is a penalty, there being no State law in force at the time the taxes became due which provided for interest; 2nd, that portion of the law which sets aside a previous sale of property bought in by the State, and places said property under the provisions of the law, subjecting it to a foreclosure of the tax lien is retroactive, thus both of the above provisions being retroactive are therefore void; 3rd, error in the judgment of the Supreme Court, in holding that under the pleadings, title to the property was shown to be in the State of Texas and therefore subject to the terms of redemption as imposed by Chapter 103.

We do not deny that these questions were raised and properly presented to the Supreme Court of Texas, nor that the judgment was final and was rendered by the highest court of the State of Texas. We understand, however, the law to be that one of the Federal questions enumerated in the statute (Sec. 709, R. S. U. S.) must have been *decided* by the Supreme Court of the State, and that the decision was *against the right* claimed by plaintiff in error, under the Constitution of the United States, or that the decision of the question was *necessary* to the judgment rendered in the case.

AUTHORITIES.

Murdock vs. Memphis, 20 Wall., 590.
Railroad Co. vs. Maryland, 20 Wall., 643.
Myrick vs. Thompson, 99 U. S., 291.
Citizens Bank vs. Board of Liquidation, 98 U. S., 140.
Williams vs. Oliver, 12 How., 125.
Klinger vs. State of Missouri, 13 Wall., 257.
Chouteau et al. vs. Gibson, 111 U. S., 200.
Detroit City Ry. Co. vs. Guthard, 114 U. S., 133.
Brooks vs. Missouri, 124 U. S., 400.
Scudder vs. Comptroller, 175 U. S., 32.

Chief Justice Waite delivering the opinion of the court in the case of Brown vs. Atwell, 92 U. S., 327, says: "*We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.*

"Commercial Bank of Cincinnati vs. Buckingham's Executors, 5 How., 341.

"Lawler et al. vs. Walker et al., 14 How., 154.

"Railroad Company vs. Rock, 4 Wall., 180.

"Parmelee vs. Lawrence, 11 Wall., 38."

The same learned judge, in the case of Citizens Bank vs. Board of Liquidation, says: "*To give us jurisdiction under Sect. 709, Rev. Stat., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause.*

"Williams vs. Oliver, 12 How., 125.
"Klinger vs. State of Missouri, 13 Wall., 257."

What, then, does the record in this case disclose as to the decision of a Federal question by the Supreme Court of Texas? An examination thereof will show that the Court of Civil Appeals based its judgment on the regularity of all the proceedings by the officers as prescribed by the State law in question, and sustained that part of the judgment of the trial court which imposed six per cent. interest on the following grounds: "The lands were forfeited to the State by the sale for the taxes of 1884, the forfeiture to become absolute in two years. The offer of the State is to waive this forfeiture and restore the land to the owner if he will only pay the taxes accruing since then and six per cent. interest thereon, together with the costs which had been incurred in making the sale and in making up the delinquent lists and of the suit. The State has waived its right of forfeiture on condition that the taxes with interests and costs shall be enforced against the land. This it might do." (Trans., p. 24.)

The Supreme Court granted the writ of error to the Court of Civil Appeals because of the question presented by the imposition of the six per cent. interest. The court says:

"The writ of error was granted because we were of opinion that the imposition of interest upon the taxes, after they had accrued, was violative of Section 16, Article 1, of the Constitution, there being no law in force at the time the taxes were levied and assessed which authorized the collection of interest thereon. But, upon more careful examination of the case, we are satisfied that the judgment of the Court of Civil Appeals is correct, and must be affirmed.

"We deem it unnecessary to enter into a discussion of the various grounds presented in the application for the writ of error; they are well disposed of by the opinion of Chief Justice Garrett. However, upon the point on which the writ was granted, we will say that the answer of the defendant sets up the sale of the lands for taxes and the purchase of them by the State, insisting that the State is bound by its purchase. No attack is made upon the sale nor upon any of the proceedings leading up to it, and it stands before the court, under the defendant's allegations, as a valid sale by which the title passed to the State. The State having acquired the title, had the power to waive its right, and in order to perfect

the claim beyond all dispute, to foreclose its lien on the land as against the then claimant, and in doing so, had the authority to prescribe such terms as it deemed proper and just. The claimant of the lands being a party defendant, could have disclaimed any interest in it and might thus have escaped any costs for proceedings had after such disclaimer. The defendant chose not to pursue this course, and he has no cause of complaint as the case stands before this court, because, by his own showing, he had no title to be affected by it and depended solely upon the grace of the State for whatever he might get out of the land. This conclusion is based upon the fact that the title in the State is perfect and is not intended to express an opinion on the question when the proof does not show this fact." (Trans., pp. 44 and 5.)

Thus it clearly appears from the opinion itself that no Federal question was decided by the Supreme Court of Texas. If not decided, was it necessary to decide it in order to sustain the judgment of the court? The principle upon which the case at bar was decided, is universally recognized as one founded upon common sense and justice; furthermore, it adds greatly to the simplicity of procedure and the efficiency of the court in the despatch of business. The plaintiff in error did not in the trial court set up any defense to the justice of the tax demanded, further than that he was, as it were, an innocent purchaser, nor did he urge or show any irregularity in the tax proceedings of any year or of the sale for the taxes of 1884. On the contrary, he insisted in his answer that the State was bound by said sale.

It is too clear for controversy that the *method for the levy and collection of State and county tax is purely a matter of State concern. Equally so, is the question of pleading, provided one is not deprived of his right to be heard.*

The case was tried before the district court without a jury. It found generally on the pleadings and the proof, there being no law requiring a special finding of facts and a written opinion. The Supreme Court finds that upon the pleadings and the proof, that title to the property in controversy passed to the State of Texas by the sale for the taxes of 1884; at least, such a sale as would justify the imposition of the six per cent. interest and the costs of this procedure in accordance with legislative enactment.

In the case of Bolling vs. Lersner, 91 U. S., 595, Mr. Chief Justice Waite says: "We cannot re-examine the judgment or

decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered." Further, he says: "But if we go further, and look to the opinion of the court, which, in this case, has been certified here as a part of the record, we find the Federal question was not decided." In the case of Melendy vs. Rice, 94 U. S., 797, the same judge says: "*Whenever the judgment of the highest court of a State is brought here for the re-examination of some decision of a Federal question, we must consider the question as it comes to us from that court. This record shows that the question below was whether a finding of fact by a referee should be set aside because not sustained by the evidence. Upon writs of error to the courts of the United States, we cannot be called upon to decide such a question, because the finding of the court below as to facts is conclusive upon us.*"

"Morris vs. Jackson, 9 Wall., 127.

"Insurance Company vs. Sea, 21 Wall., 160."

Applying the doctrine, as above announced, can it not be said from the opinion of the Supreme Court of Texas which is a part of the certified record (Trans., pp. 43-45) that no Federal question was decided, and that the question presented for review is, does the evidence in the case justify the conclusion of the Supreme Court that the title to the lands in question was in the State of Texas by reason of the sale for the taxes of 1884.

It will not be presumed that a decision of the Supreme Court of a State was based upon other considerations than those mentioned in the opinion. (Keith vs. Clark, 97 U. S., 454.)

Judge Brown, of the Supreme Court of Texas, delivering the opinion, says: "This conclusion is based upon the fact that the title in the State is perfect, and it is not intended to express an opinion on the question when the proof does not show this fact." (Trans., p. 45.)

The effect to be given pleadings is well settled in this State.

Sampson vs. Mercer, 68 Texas, 488.
Ogden et al. vs. Bosse, 86 Texas, 344.

It is a question of local and general law not in any way involving a Federal question, and is not reviewable by this Honorable

Court. In the case of Chouteau vs. Gibson, 111 U. S., 200, which was a suit to obtain a conveyance of certain lands, to which the defense of *res adjudicata* was set up, the court says: "Whether an equitable title could be set up in bar of the action at law brought by Gibson, the holder of the legal title, to recover possession, is a question of State law upon which the judgment of the State court is conclusive. The same is true of the question whether the pleadings in the former action were such as to present the equitable defense in proper form for final adjudication. The court below has decided that the pleadings were sufficient; * * * It is apparent, therefore, that no Federal question which there may have been in the case was decided by the State court, and that the decision of such a question was not necessary to the final decree rendered."

If we are not correct in our view of the law as applicable to the question of jurisdiction, we beg leave to submit the following upon the merits of the case. We do not think it necessary to consider separately the three propositions under the *second specification of error* as set out by counsel for plaintiff in error. We submit the following

COUNTER-PROPOSITION.

The State has an election of remedies in the collection of taxes. It may proceed under the summary power of seizure and sale given an administrative officer, or it may provide for collection by means of a suit and foreclosure of the tax lien. The right to redeem after two years from date of sale, not being a vested right, may be changed by the Legislature. After forfeiture, by sale to the State, the resulting rights of the State may be waived, there being no other parties interested therein.

AUTHORITIES.

Constitution of Texas (1876), Art. 8, Secs. 3, 13 and 15.
Revised Statutes of Texas (1895), Arts. 5176 to 5189.
Ch. 103, Acts of Twenty-fifth Legislature.
City of Henrietta vs. Eustis, 87 Texas, 14.

ARGUMENT.

There is no contention between counsel for plaintiff in error and counsel for the State in reference to the method pursued by

the State in the forced collection of taxes prior to the passage of the law of 1897 (Ch. 103, Session Acts Twenty-fifth Legislature).

Article 8, Section 3, of the Constitution, provides: *"Taxes shall be levied and* COLLECTED BY GENERAL LAWS *and for public purposes only."* There is no necessity in the consideration of this case to inject into it difficult questions which do not properly arise. Whether the State could, under the above section, or Sections 13 or 15, of Article 8, of the Constitution, proceed by suit in the collection of taxes without any act of the Legislature authorizing such procedure, is not necessary to consider in this connection, because the State never undertook such a method of collection. (As to the power, see Cave vs. City of Houston, 65 Texas, 619; City of Henrietta vs. Eustis, 87 Texas, 17.)

The experience of a number of years had taught the legislators of the State that very serious defects existed in our tax laws, especially in collecting taxes due the State and counties. This was shown by the great amount (constantly increasing) of the taxes unpaid and long past due; and further shown by the indifference exhibited by citizens of the State in allowing their landed property to be sold for taxes due thereon and never redeeming same unless compelled to do so when they wished to borrow money thereon or when about to make a sale, the condition precedent to which was a clear title. The experience of litigants in their attempts to hold property under and by virtue of a tax deed had created among the people an idea that upon a contest taxes could not be collected. This proved to be practically true when the tax was attempted to be made out of land by the summary sale as exercised by tax collectors. The situation demanded of the Legislature some remedy for existing evils. In Chapter 103, of the General Laws of 1897, a method is provided not only for collecting taxes then delinquent, but for future delinquencies. It purports to cover the entire field and provide a general system for *the collection* of all ad valorem taxes to take the place of the system which had been previously in force. That system was an exercise by the tax collector of the power given him to levy upon and seize personal property sufficient to satisfy the demand for taxes, and in the event this was not done, then to summarily seize and sell one's land. This was done without any judicial process to determine any disputed issues.

The material changes which have been made are to have a judi-

cial inquiry and determine the validity of the tax previous to a sale of the property, and not afterwards, and to change the burden of proof. The evident purpose of the act in question is to enforce a lien for delinquent taxes against the land; *a lien given by the Constitution and fixed by the levy and assessment of the tax.* The title of the act does not refer to a delinquent taxpayer against whom or in whose name the tax was assessed, nor to the owner of the land; but provides for the collection of taxes, *"making such taxes a lien on the lands taxed; establishing and continuing such lien."* THE FIRST SECTION of the law defines, for the purpose of taxation, *real property.*

SECTION 2 includes within the provisions of this law all taxable real property of the State, and further says *"and said taxes shall remain a lien* upon the said land, although the owner be unknown, or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to be due by such assessment, for any preceding year."

We have no doubt that the county attorney, representing the State, could have brought suit TRESPASS TO TRY TITLE, on the theory that the State was the owner and holder of the legal title to the land in controversy. However, he saw proper to pursue the remedy set out in Chapter 103, of the Acts of 1897, viz.: the foreclosure of the tax lien, regardless of whether the sale for the taxes of the year 1884 conferred upon the State a legal title. In view of the general bad results in efforts to show all the necessary steps leading up to and constituting the *power of sale*, besides the *regularity* of the sale itself, the county attorney would have been fully justified in presuming the invalidity of the sale. If the sale was void, there is no question that the State would have the right to foreclose its lien for the taxes for the *year 1884*, this being the tax the failure to pay which caused the summary sale by the tax collector. (McInery vs. Reed, 23 Iowa, 416 and 417; Mayor vs. Colgate, 2 Kernan, N. Y., 147.)

There is no merit in the contention of plaintiff that the sale for the taxes of 1884 merged the State's lien for the taxes of even that year into the estate which passed by the sale, for the reason that the State gives back any title she might have acquired and

the parties or those claiming title under them are placed in *statu quo*—no injury resulting to either party.

While the State may have had title to lands sold under the summary power of tax collectors, her policy, at least, is indicated by the laws in force which pertain to the disposal of such lands and the course pursued by the administrative officers of the State in reference thereto.

Article 5194, of the Revised Statutes, provides that the owner or his agent may redeem land sold to the State. Article 5195 is as follows: "In case said land shall not have been redeemed as provided in Article 5194, then the same may be sold as provided by Article 5193." An examination of Article 5193 *discloses no method for the sale of such lands by the State.* Said article provides that a deed shall be executed to the State, which deed shall include all tracts of land bid off to the State at the tax sale, and make due return thereof under such forms and directions as the Comptroller may furnish and direct.

To further show the policy of the State as to lands which have been sold and bid in by the State for want of a purchaser, I quote the following portion of ARTICLE 5193: "*And after sale and purchase by the State of any real estate it shall not be lawful for said collector to levy upon or advertise or sell the same for any remaining or accrued taxes due thereon until the same shall have been redeemed by the owner or is sold by the State.*"

The article of the statute providing for redemption by the owner, his heirs or assigns or agent, provides that he may do so by depositing with the collector of the county in which the lands were sold double the amount of the purchase money and all *accrued taxes* thereon, within two years from the date of deed to the State.

Whether the State, upon the receipt of the deed from the collector became the true legal owner of the land, or whether it became, so long as there was a right of redemption, merely the holder of an equitable title to such time as should suit the convenience of the owner in the payment of the delinquent taxes, can not affect the question of the policy of this State in seeking to give every chance possible to pay all taxes due. This view is greatly strengthened by observing the redemption laws passed by the Legislature at almost every recurring biennial session.

The right of the owner in the case at bar, to redeem the property, expired twice by the failure of the Nineteenth and Twenty-

second Legislatures to pass an act extending the time for redemption. It is unnecessary at this time to consider whether the sale for the taxes of 1884 was valid. If void, the cases cited above sustain the position that the State would still have a lien for the taxes due and unpaid, and could proceed to collect same.

We call the court's special attention to plaintiff's *third proposition* on page 6 of his brief, wherein he claims the law, authorizing this suit, is unconstitutional as not being due process of law, "*in so far as its provisions are intended to avoid the legal effect of a prior sale for taxes, by directing a second foreclosure proceeding for collection of the same taxes.*" Counsel on behalf of the State make no contention that if a sale for taxes had taken place and a third person became the purchaser, the State could pass a law changing the status of the parties to the transaction. The law fixing the period of redemption at the time of the sale would become a part of the contract. We maintain, however, that the State could sell the land again for the next year's tax, notwithstanding the lien for the previous year had been exhausted, as it were, and merged in the sale. So in the case at bar, the proposition does not fit the facts. The highest court of Texas, in construing this law, has said that its terms do not include the collection of the taxes for the year 1884. As we understand the decisions, this honorable court will follow the construction of the highest State court when no Federal question is involved in the State statute construed. It could certainly not be contended that leaving off or putting in a certain year (viz.: 1884) as the limit of time beyond which the statute does not extend for the purpose of collecting taxes, could involve such a question. The question presented to the Supreme Court of Texas, as well as this honorable court, is the right and power of the State of Texas to collect taxes for the year 1885 and subsequent years where no process of the State has ever issued for the collection of such taxes. An examination of the Transcript of Record (pp. 9 to 19), constituting the statement of facts as proved on the trial of the case, will support the above statement.

ARTICLE 8, SECTION 15, STATE CONSTITUTION, provides: "*The annual assessment made upon landed property shall be a special lien thereon * * * and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.*"

CHAPTER 103, SECTION 2, provides: "All lands or lots which have *been returned delinquent*, or reported *sold to the State*, * * * shall be subject to the provisions of this act, and said taxes *shall remain a lien upon said land*, although the owner be unknown or though it be listed in the name of a person not the actual owner, and *though the ownership be changed*, the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to be due by such assessment *for any preceding year*." The very words of the statute show that the act does not attempt to create a lien and impose the same retroactively where none existed before, but merely declares that "said taxes shall *remain a lien* upon said land," etc.

The lien was created by the Constitution and fixed by the *annual assessment*. We candidly confess that we doubt the power of the Legislature to impose a lien upon property listed in the name of a person not the owner unless the description is otherwise sufficient to identify the property. This, however, is not involved in this case, and if it were it should be raised at the proper time, in accordance with the rules of pleading in force in this State.

Redemption acts are in their nature remedial, and may be changed at any time, though the terms imposed be retroactive.

Flinn vs. Parsons, 60 Ind., 573, *et seq.*, presents a case of a delinquent tax sale where the law, authorizing redemption upon a failure of the purchaser's title, fixed the interest at 6 per cent. In 1872, an act was passed which repealed all former laws in conflict therewith and fixed the rate of interest to be paid by the owner at 25 per cent. The court holds that the law in force at the time of sale does not control, or, as claimed by counsel in the case at bar, fix the status of the parties to the sale. It was held to be retrospective in its purpose and "*intended to apply, in the most comprehensive terms, to the holders of all tax deeds, without reference to the time at which any of the tax sales took place.*"

Counsel for plaintiff in error cites Desty on Taxation (pp. 1011 to 1020) on the question of the enforcement of tax liens where the tax sales were, for any reason, declared illegal. In all the cases examined, which are there cited, we do not find one applicable to the case at bar, where the owner of the land and the State are the parties at interest. All of them relate to the case where a third person, at a sale for delinquent taxes, bid for and acquired the property upon payment of the taxes. Upon failure of the tax deed

to pass title, a statute provided that the owner should reimburse the one who, in good faith, had paid the delinquent taxes; thus being substituted, as it were, to the lien of the State, the owner of the land having received the benefits thereof.

In this case, no money for the taxes of 1884 was received by the State, and consequently the lien was not discharged.

In this State there is no statute of limitation which runs against taxes owing to the State or county. After the lien for taxes has attached to real property, it follows such property, and there can be no subsequent purchaser without notice, nor person holding a title superior to the claim for taxes.

It has been decided by the Supreme Court of this State that if there was no valid assessment of the property prior to the time of his ownership, no lien attached and a subsequent purchaser could not be made liable for the taxes which were supposed to have been due and delinquent. State vs. Farmer, 59 S. W. Rep., 541.

If the plaintiff in error had shown upon the trial of this case that the taxes for the year 1884 were not properly levied or assessed, or that the sale was not according to law, then such sale could and would have been set aside. Whether any lien existed for years subsequent to 1889, when this plaintiff in error became the owner, was a question dependent upon the facts.

In view of the facts of this case, as disclosed by the record, this court is presented with a valid sale for the taxes of 1884 and a purchase by the State, a lien for the taxes subsequent thereto being the years prior to 1889 and also since the ownership of the plaintiff in error. While counsel insists that the law impairs a vested right, and by its method of procedure attempts to and is an evasion of due process of law, shutting out any defense other than payment of the tax, we assert, with full confidence, that the law affords every reasonable opportunity to a delinquent taxpayer to have his day in court, and to show the invalidity of a sale, levy or an assessment. No court of this State has decided otherwise, or that property of the individual can be confiscated under the sanctity of a tax deed.

In answer to the proposition submitted by plaintiff in error on page eleven (11) of his brief, we submit the following

COUNTER-PROPOSITION.

It is within the power of the Legislature to provide whatever procedure seems best adapted for collecting taxes and for foreclosure of the lien which is given by the Constitution and the laws; such law being one which affects the remedy and not depriving delinquents of any substantial rights.

AUTHORITIES.

21 Ohio State, 210.
15 Wall., 300, 319.
19 Wall., 227.
65 Texas, 619.
73 Texas, 343.
26 S. W. Rep., 619.
92 Texas, 319.
Clarke vs. Strickland, 2 Curt., 493.
Hodgdon vs. Burleigh, Vol. 4 Fed. Rep., p. 111.
Masterson vs. State, 42 S. W. Rep., 1003.
Conklin vs. City of El Paso, 44 S. W. Rep., 883-4.
Traylor vs. State, 46 S. W. Rep., 81-2.
Fristoe vs. Blum, 92 Texas, 80.

ARGUMENT.

Not desiring to take a position before this Honorable Court which we do not believe is sound in principle, we frankly say that that part of Section 13 of the act which states "That any delinquent taxpayer whose lands have been *returned delinquent* * * * may redeem the same at any time before his lands are sold under the provisions of this act by paying to the collector the taxes due thereon since January 1, 1885, with interest at the rate of six per cent. per annum," etc., can not as to the six per cent. interest be sustained under the above proposition. It certainly, as contended for by plaintiff in error, does not constitute any part of the costs of procedure. However, we do not think that it was improperly taxed up against *this defendant* under the particular facts of this case, which we will undertake to show further on. As to the other items of cost, we do not think they are retroactive or at least not in contravention of "due process of law" within the meaning usually given to that term.

The lien having been fixed by the Constitution and the law, and such lien being still in full force and effect by reason of the non-payment of taxes, the Legislature can provide for the foreclosure of the lien, which carries with it the *necessary cost of such procedure*. The defendant acquired the property with full knowledge of delinquent taxes against it. It was both his right and his duty as a citizen to pay such delinquent taxes and relieve it of the lien against it. Not having seen proper to do so, he can not now be heard to complain of necessary costs of suit. He is *in default*, and by all the principles of law he is estopped from setting up as a defense a condition of affairs caused by himself. He acquired the property in 1889, and had not paid the tax up to the time of the passage of the law.

He is in default since the passage of the law in question, for the reason that he had sufficient notice of the *public* law and sufficient time thereafter to pay the taxes before any of the costs as provided by this law had accrued. Defendant, it is true, did not *assume* the payment of the taxes, being a subsequent purchaser. The duty to pay taxes is not one which arises by reason of a contract, either express or implied. It is a demand made in the exercise of the sovereign power of the State.

We call the attention of the court to the fact that *part* of the taxes sued for herein were levied and assessed since this defendant became the owner of the property in 1889, and since the passage of Chapter 5a, Title 104, of the Revised Statutes of 1895. We quote from the opinion of Fristoe vs. Leon & H. Blum, decided by the Supreme Court of Texas, 92 Tex., 80: "It is well settled that so long as the State is engaged in making or enforcing laws or in the discharge of any other governmental function it is to be regarded as a sovereign and has prerogatives which do not appertain to the individual citizen," etc.

"We prefer, however, to put this decision upon the broader ground and stronger position that where a right exists the Legislature may give a new remedy, provided it does not deprive either party of a substantial right," p. 83, and citing authorities. If the tax suit provided for by the act in question is a method of procedure or appertains to the remedy and does not deprive the delinquent taxpayer of any substantial right, then it is not inconsistent with due process of law. Can this Honorable Court say that the costs provided for are *not reasonable?*

The case of 44 Conn., 291, cited by counsel, is not analagous to the one at bar. In that case the statute attempted to make the "owner" of a carriage responsible for any damage resulting from the carelessness of the driver. There was no necessary or other relation between the owner and driver in the *resultant* damage. In the case at bar, all the extra costs are the direct result either of the carelessness or wilfulness of the defendant, for which he ought to be responsible.

The case of G. C. & S. F. Ry. vs. Ellis, 165 U. S., cited by plaintiff in error, in which a statute of this State was declared unconstitutional because it was *class legislation*, is not applicable to this case. This act refers to all delinquents alike. The terms imposed are the same for all property regardless of the owner.

Counsel for plaintiff in error admit that it is within the power of the Legislature of a State to impose prospectively a penalty upon delinquents for failure to pay taxes. We will not controvert the contention of counsel for plaintiff in error that the six per cent. interest imposed by Section 13 of the Act of 1897 is a penalty; nor the further proposition that interest is not an incident of a tax and cannot be exacted without statutory authority. The Texas cases cited in the brief of opposing counsel fully sustain the position that a tax is not a debt, bearing interest within the purview of our interest statutes.

In the case of Lydecker vs. Palisade Land Co. et al., 33 N. J. Eq., 416, a mortgage having been given on a piece of property in 1872, the complainant contended that said mortgage lien was superior to a tax lien created by a law of 1879 for the taxes of 1879 and 1880. The court says: "But it is established that the Legislature has power, by virtue of its sovereignty, to make taxes a lien upon the estate of all parties interested in the land, and to make the tax title paramount to all other and prior claims and encumbrances."

In the case just cited, the court sustained the power of the Legislature to enact not only a retroactive law, but one which affected injuriously the rights of third parties.

In the case of State vs. Mayor, 42 N. J. L., 38, where the construction of a provision in the charter of the City of Newark was under consideration, the court says: "It must be admitted that the lien of the tax levied on the land is superior to the lien of the prior mortgage," etc. (p. 44). Further, "This relates exclusively to real estate assessments, and could not apply to personal estate taxes. In

assessing the latter, the person assessed is not named as the owner of real estate. This clause shows that the draftsman had in mind only the taxes upon real estate, and that it was his purpose to secure their payment beyond any contingency. This was a wise, and, perhaps essential, measure for the collection of the public dues, and there is manifest in it no injustice" (p. 45).

The plaintiff in the case of Morrison vs. Larkin, 26 La. Ann., 701, contended that a tax law of the State of Louisiana was void as being in contravention of the State Constitution and also Section 1, of Article 14, of the amendments to the Constitution of the United States. The court says:

"That the State has the power to levy and collect taxes can not be doubted; and that she can impose damages for non-payment of the taxes after due notice, is equally certain. The implied contract of every citizen of the State, is to bear his share of the common burden of taxation to support the government. If he should fail to meet this obligation there is no reason why he should not pay damages for breach thereof.

"Having power to collect taxes, the State has authority to use whatever means that are necessary to accomplish the object. The law authorizes the forfeiture of the land to the State after due notice has been given to the owner, and reserving to him the right of redemption on paying certain damages and costs, we regard as a legitimate means employed by the State to collect her revenues. If there were no damages and no forfeiture, how could the State collect taxes, if from combination among bidders or otherwise, no one would bid for property when offered for sale? Without the fear of penalties and forfeiture of his land to the State, an obstinate taxpayer might successfully withhold from the State her legitimate revenues. We find nothing in the law authorizing the forfeiture of the lands to the State for non-payment of the taxes after due notice, repugnant to the articles of the State Constitution relied on by the plaintiff. Nor is it in contravention of Article 1 of the Fourteenth Amendment of the Constitution of the United States."

To the same effect is the case of High vs. Shoemaker, 22 Cal., 370. The court says: "The taxpayer is allowed until the third Monday of October to pay his taxes, and if at the close of that day he is in default, then further proceedings are to be taken to enforce the judgment. Among other things, the delinquent is charged five per cent. upon the amount of his tax. This is not an equivalent for

the tax, or a substitute for it, or a sum fixed, by the payment of which an atonement is made for the default to pay the tax, but is one of the means prescribed for obtaining the tax itself by presenting an inducement to make voluntary payment on or before the day fixed for that purpose. We cannot say that it was not competent for the Legislature to authorize this percentage to be collected in the same way as the fees of the officers made necessary in other proceedings to enforce the payment of taxes."

But in answer to the above, counsel for the plaintiff in error would say that it is not denied that it is within the power of the Legislature to add penalties for the non-payment of taxes within a certain time, but that the operation of such a law must be prospective; that in the case at bar the six per cent. interest is retroactive and is added as a penalty against the delinquent, there being no such interest or penalty due at the time the taxes were assessed and became due.

I refer to the case of Worthen vs. Badgett, 32 Ark., 529-532, as bearing directly on this point. The appellees failed to pay the taxes due upon the lands for 1873. Before the sale of the property the Legislature extended the time for the payment to April 20, 1875, upon payment of taxes and costs *without any penalty*. Before the expiration of the above mentioned period the Legislature, February 22, 1875, passed another extension act for the benefit of delinquents as to the taxes for 1873 and 1874, extending the time of payment to March 31, 1876. "By Section 3 it was made the duty of the clerks of the several counties, in making out the tax books for the year 1875, to include such delinquent list for the years 1873 and 1874, together with a penalty of fifteen per centum on such delinquent taxes, which should be collected as other taxes, and paid in the treasury as required by law."

The court says: "Had appellees paid the taxes legally due upon their lands for the years 1873 and 1874, by the 20th of April, 1875, no penalty could have been imposed upon them for the other years. But as they thought proper to avail themselves of the grace offered by the Act of the 22nd of February, 1875, they accepted it on the condition upon which it was offered; that is, they should pay a penalty of fifteen per cent. upon their delinquent taxes for the two years. That was a compensation to the public for being deprived of the use of the money during the period of grace allowed the taxpayers. There must, however, be no compounding of penalties. A

single penalty of fifteen per cent. upon the legal taxes for the two years is all that can be exacted."

The same doctrine is announced in the case of State vs. Certain Lands, 42 N. W. Rep., 476. While that case was reversed because of the fact that certain illegal taxes were included in the assessment, yet the principles announced are, we think, sound.

The facts of the case, Smith vs. Auditor General, 20 Mich., 398, presents a question almost identical with the one involved in the case now before this court. Property belonging to Smith became delinquent for the taxes for 1868. Under the law then in force, office charges and 15 per cent. interest were assessable against the person as a penalty for the delinquency. The law of 1869 made the rate of interest 30 per cent. on delinquent taxes. While in this case Judge Cooley, rendering the opinion, decided that the statute did not contemplate taxes already assessed, he announces, as we think, the proper doctrine in the following:

"We do not understand it to be questioned that it was competent for the Legislature to make the general provisions of the Act of 1869 apply to the taxes previously assessed and returned, so far as the subsequent proceedings to be taken by the State were concerned, if they had seen fit to do so. The question is, whether they have expressed an intention to that effect. Unless that intention distinctly appears, the familiar rule of construction which presumes that legislation is designed to have prospective operation only, will require the court to hold that the legislative purpose was that this act should apply only to taxes subsequently assessed.

"For although to apply to the taxes previously levied would not, so far as the course of official proceedings for the enforcement thereof is concerned, be strictly retrospective in the proper sense of that term, yet so far as it increased penalties, or in any manner affected the taxpayer's rights or interest as they depended upon previous acts or delinquencies, it would be plainly so, and the purpose of the Legislature to give it that operation is not to be presumed where the words are ambiguous or reasonably susceptible of a different construction."

As said by the distinguished judge just quoted, a statute should not be construed as having a retroactive effect, unless such intent clearly appears.

In the case at bar, there is no room for construction. The legislative will is clear.

SECTION 2 provides, that "*All lands or lots which have been returned delinquent, or reported sold to the State, etc.,* * * *, *or which may hereafter be returned delinquent or reported sold, etc.,* * * * *shall be subject to the provisions of this act, etc.*"

SECTION 13 provides, "Any delinquent taxpayer whose lands *have been returned delinquent* or reported sold to the State for taxes due thereon, or any one having an interest therein, may redeem the same at any time before his lands are sold under the provisions of this act by paying to the collector *the taxes due thereon since January 1st, 1885*, with interest at the rate of 6 per cent. per annum and all costs and the penalty of 10 per cent., as provided for in Section 10 of this act; provided, such penalty has accrued under the provisions and since the passage and taking effect of this act."

We contend that even in applying a very strict test to the above provisions, they are not, properly speaking, retroactive. Has the plaintiff in error had an opportunity to pay the delinquent taxes, unaffected by the question of costs and interest? If so, he has no just cause of complaint. The statute was passed by both branches of the Legislature and became a law in April, 1897, but not having passed by the requisite number of votes as prescribed by the Constitution, did not become effective till ninety days after the adjournment of the Legislature, viz.: ninety days from May 21st, 1897. During all this time plaintiff in error, after full notice, was delinquent in the payment of his taxes and defaulted in his duty to the government which was protecting him in his life, liberty and the pursuit of happiness. We believe that this Honorable Court cannot say that the small sum of 6 per cent., the statutory rate of interest where none is provided by contract, is unreasonable.

To meet the *third specification* of error we submit the following

COUNTER-PROPOSITION.

The Legislature has the power to waive any rights which may have accrued to the State by reason of a sale to the State of property delinquent for taxes. The courts, in the trial of a case, are limited to the issues made by the pleadings of parties to the suit. It is necessary to prove only those issues which are in dispute.

AUTHORITIES.

Sampson vs. Mercer, 68 Texas, 188.
Ogden et al. vs. Bosse, 86 Texas, 344.

ARGUMENT.

Under our second proposition, we contended that the Legislature had the power to impose a penalty for taxes already assessed, but which were delinquent; and that if notice was given to the delinquent taxpayer of such increased burdens, and an opportunity was afforded him to pay his taxes before the accrual of such penalty, such legislation was not retroactive, and does not contravene the Constitution. We call the court's attention to the fact that counsel for plaintiff in error constantly refers in the course of his argument to a *second sale* for the *same taxes*. If this honorable court is to decide this case upon the record, such question is not presented. The Court of Civil Appeals reversed and reformed the judgment of the trial court by eliminating the tax for the year 1884. The record shows that there was no sale other than for the taxes of that year. Hence, under the judgment of our Supreme Court there will be no second sale for the *same taxes*. The Legislature has seen proper in enacting Chapter 103 to waive the title of the State where sale had been made for the non-payment of taxes and the property bid in by the State, and place the same again within reach of the owner.

This is more equitable than absolute forfeiture. After sale by which the title of the owner is divested, there still remains the equity of redemption for a certain period of time. This is true only of property sold by the tax collector under his power of summary seizure and sale, which power was granted by the Legislature under the provisions of Section 13, Article 8, of the Constitution. After the period of *two years thus prescribed* shall have elapsed, the Legislature has full authority and power to prescribe the terms of redemption, *not restricted by the words of the Constitution "upon the payment of double the amount of money paid for the land."*

In the case of Conklin vs. El Paso, cited above, and in which a writ of error was denied by the Supreme Court, the court says: "It is apparent that payment of taxes and interest from 1885 to 1895, at 6 per cent., would be less than the sum defendant would

have been obliged to pay under the laws as they existed at the time of the sales, in order to redeem the property * * *. There is nothing to prevent the owner in such a case from not insisting on the right to redeem given him by the statute. But if he defends, and seeks to avail himself of the benefits thereof, he, it seems, should be held to do so on the terms it provides," etc.

The counsel for plaintiff in error argues that the State could not directly sue and collect from the owner or claimant the amount required for the redemption of property sold to the State by the collector and consequently can not enforce a collection of the tax and the costs as provided by Chapter 103, which he claims is virtually the same result. It is not claimed on the part of the State that such can be done as against the will of the owner.

It is true that in the petition filed by the State of Texas, against plaintiff in error, it is averred, "*that the defendant is justly indebted to the State of Texas and the county of San Augustine in the sum of thirteen hundred and five dollars and eighty-seven hundredths dollars ($1,305.87), taxes and interest due on the lands hereinafter described*," *etc.* (Subd. 3, Trans. p. 1.) But it is further averred, "that the *said several sums of money* due and owing said State and county as aforesaid are *a charge and lien* upon the following described land and real estate, towit," (Subd. 5, Trans., p. 2) and further, "premises considered, plaintiff prays that the defendant be cited in due form of law and for *judgment for all taxes, interest, penalties, and costs*, and the *lien be in all things foreclosed*, and *that the lands be sold to satisfy said judgment*," etc.

It will be observed that the law (Ch. 103) does not contemplate a *personal judgment* against the owner or claimant at the time suit is brought.

The opinion of the Court of Civil Appeals states, "*The judgment of the court below will be reformed so as to omit the taxes for 1884 and all penalties and to show no personal recovery against the defendant for the amount of the taxes, interest and costs adjudged to be due and thus reformed will be affirmed.*" (Trans., pp. 24-25.)

As was said in the opinion of the Supreme Court of Texas, "The claimant of the lands being a party defendant, could have disclaimed any interest in it and might thus have escaped any cost for proceedings had after such disclaimer." (Trans., p. 45.)

In this character of case, viz., the collection of delinquent taxes, the Legislature has required greater strictness of pleading. In Sec-

tion 6 of this act is the following: "The petition in such suits shall be signed by the attorney bringing the suit, and shall be verified by the affidavit of said attorney, or the county judge, to the effect that the averments contained in said petition are true to the best knowledge and belief of affiant, and the pleadings of the defendant, except those of law, shall be verified by like affidavit of the defendant, his agent or attorney." Doubtless the purpose of this requirement was to force parties to settle down to specific issues and thus divest the case of all unnecessary pleadings. Under our practice, ordinarily one may plead any and all things, both of law and equity, setting up inconsistent and contradictory pleas. Not so with tax suits. The necessities of the government must be met, and met promptly, otherwise the efficiency of the administration of public affairs will be greatly impaired and the very existence of government itself threatened. The Legislature of Texas is supposed to have been aware of the serious condition of affairs by reason of so many failures to pay taxes, as evidenced by the sentence immediately preceding the above quotation, to the following effect: "All suits to enforce the collection of taxes, as provided in this act, shall take precedence and have priority over all other suits pending in the district court." (Sec. 6, Ch. 103.)

Now, taking defendant's answer, set out on pages 4 and 5 of the transcript of record, we find the first eleven subdivisions are matters of law. That part which is capable of verification follows the general denial. We quote it at length: "And, further answering, defendant shows that he purchased the lands described in plaintiff's petition and exhibits about the year 1889, and that said lands have been sold by the collector of taxes of San Augustine county for 1884 taxes and for taxes of subsequent years, and they have been in every instance bid in by the collector of taxes for the State of Texas in obedience to the laws of said State, and the officers and agents of said State are attempting in this suit and by their demands on this defendant, made under and by authority of alleged laws of said State enacted long after said sales were made, to ignore said sales and avoid the legal effect of said sales, and said State by its said pretended legislation and by its officers and agents is endeavoring to deprive this defendant of his said lands acquired by him after said land had been sold and bought in by said State. Wherefore defendant prays that he may go hence with his costs." (Trans., p. 5.)

Defendant's general denial applies to every necessary allegation of the petition. What is the purport of the rest of the answer? If title to the land in question did not pass to the State by reason of the sale for the taxes of 1884, how is the State attempting to ignore said sales and how or in what manner to avoid the legal effect of said sales? Counsel for plaintiff in error nowhere attempts to tell us the legal effect of a summary sale for taxes. It either passed title or failed therein. If it failed therein, the State still had a lien for the taxes for which the sale was made and no injury is done that the State should finally collect at the end of a long and vexatious litigation that which should have been paid voluntarily. But plaintiff in error insists on the State recognizing the legal effect of the sale. Under the pleadings as set forth, we do not think that the defendant was prevented from showing the irregularity of the sale for taxes of 1884. The delinquent tax record, as introduced in evidence by the county attorney on behalf of the State, was only *"prima facie evidence that all the requirements of the law have been complied with by the officers charged with any duty thereunder, as to the regularity of listing, assessing, levying of all the taxes therein mentioned, and reporting as delinquent or sold to the State any real estate whatsoever, and that the amount alleged against said real estate is a true and correct charge."* (Sec. 3, Ch. 103.) With the case thus made out, without any proof as to any irregularity in the levy, assessment or sale, can this Honorable Court say that the State of Texas did not have title to the land—such title as would justify the State in imposing the insignificant penalty of six per cent. as a condition of redemption. The opinion of the Supreme Court of Texas is based upon the case as made out by the proof in the manner above indicated. We quote the following. *"This conclusion is based upon the fact that the title in the State is perfect, and it is not intended to express an opinion on the question when the proof does not show this fact."*

An almost parallel case is presented on the pleadings in the case of Morrison vs. Larkin, 26 La. Ann., 700. This was an appeal from the decision of the trial court granting an injunction against the defendant, tax collector of the parish. The court says:

"The right of the defendant to sell the property of taxpayers for taxes under Act 47 of the Acts of 1873 is not disputed. But the plaintiff contends that his authority does not extend to the sale of lands forfeited to the State, as his was, under Sections 66, 67 and

68 of Act No. 42 of the Acts of 1871. The plaintiff can not assume this position without putting himself out of court, because, if his lands were forfeited to the State in pursuance of said act, the only right remaining to him is the right of redemption under Section 69 of said act, and until he chooses to exercise this right he has no more interest in said lands than any other individual. Disavowing title and setting up ownership of the State as a ground to resist the sale proposed by the tax collector, the plaintiff stands before the court without cause of complaint: he has no pecuniary interest and can not be relieved. Besides, if the defendant has no authority to sell the lands forfeited to the State, no title will pass to the purchaser, there will be no change of ownership, and the plaintiff cannot be injured."

Thus it will be seen that counsel for the State do not contend that a tax title does more than convey the title of the owner at the time the taxes were assessed. In making this admission, however, we insist that the lien may be valid though the property is assessed to "unknown owners." As the manner of compelling the appearance of proper parties to the suit is a method of procedure, the Legislature may change it at any time. Plaintiff in error cannot complain as to other parties left out of the suit, because he was properly cited and made due appearance. Having made his appearance, he has every right accorded to all defendants in the State of Texas. He has his day in court, and may disclaim and thus avoid all costs of suit. He may show the invalidity of the levy or assessment of the taxes for the years previous to 1889, the time he became the alleged owner, and thus the property will not be burdened with the lien for such taxes. (State vs. Farmer, 59 S. W. Rep., 541.) He might have shown that the sale for the taxes for the year 1884 was void, or that there was no valid assessment of taxes for years subsequent to 1889, and the Supreme Court of Texas would have been called upon to say whether 6 per cent. interest could, under such circumstances, be imposed or whether plaintiff in error was at all delinquent—no taxes being due—and therefore not liable for the payment of any penalty and the necessary costs of suit. But this evidence was not produced and the court did not pass on any such supposed condition.

In the case of Raymond's Lessee vs. Longworth, 14 How., 46, which presented the question of certainty in the description of property sold at a tax sale, the court says: "And, as the State

courts have settled what certainty is required, it is our duty to follow their decisions on the State laws regulating proceedings in cases of tax sales. We accordingly order the judgment of the circuit court to be affirmed."

The case of Windsor vs. McVeigh, 93 U. S., 274, cited by counsel for plaintiff in error, is not in point. In that case the defendant made his appearance by an answer filed, setting up his claim to the property in controversy, and upon motion of the United States district attorney, his answer was struck off the files and he was given no hearing. Thereupon judgment was entered as if upon default of parties defendant.

We respectfully submit to this Honorable Court:

1st. That this court has no jurisdiction, because the Supreme Court of the State of Texas did not decide a Federal question against the right of plaintiff in error.

2nd. That if there is a Federal question involved giving this Honorable Court jurisdiction, such question was rightly decided by the State court, and the judgment should be affirmed.

3rd. If a Federal question was erroneously decided by the State courts, the judgment herein can be maintained upon the decision made upon a question purely of local State policy, and the Federal courts should hesitate to disturb said judgment.

4th. If the State court erroneously decided both the Federal and State questions, then we ask this Honorable Court to modify and render such judgment as the record of the case merits.

Respectfully submitted,

C. K. Bell, Attorney General,

D. E. Simmons, Assistant Attorney General,

Counsel for Defendant in Error.